No. 87-920

In The
Supreme Court of the United States
October Term, 1987

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and

DUANE WOODARD, in his official capacity as Colorado Attorney General,

Appellants,

vs.

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO AFFIRM

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QUESTION PRESENTED

Does that portion of Colo. Rev. Stat. Sec. 1-40-110, which prohibits payment to circulators of petitions violate the Plaintiffs' rights to freedom of speech and political association guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States?

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The appellees move to affirm the judgment of the United States Court of Appeals for the Tenth Circuit on the ground that the appeal is so unsubstantial as not to need further argument. Rule 16.1(c).

STATEMENT

1. The appellees are five individuals and one corporation.[1] They sought to spend their own money to hire other people to circulate initiative petitions. They were prevented from doing this by a Colorado criminal statute.

2. Colo. Rev. Stat. sec. 1-40-110 made it a felony offense for the appellees to spend their money to hire others to circulate initiative petitions.

3. The Tenth Circuit held that Colo. Rev. Stat. sec. 1-40-110 was unconstitutional because it violated the appellees' right to freedom of speech under the First and Fourteenth Amendments to the United States Constitution.

4. The petitions involved in this case were being circulated under the initiative provision of the Colorado State Constitution. In order for an initiative to be placed on the ballot, signatures of registered voters constituting 5% of those who voted for the office of Secretary of State in the last general election, (in this case 46,737 signatures), had to be obtained. Colo. Const. Art. V, Sec. 1. The petition called for a ballot initiative to amend the Constitution of the State of Colorado to remove motor carriers from the jurisdiction of the State Public Utilities Commission.

5. According to Appellant's trial Exhibit E, twenty-four states have some form of initiative process. Of these,

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1. The corporation does not have any affiliates, subsidiaries or a parent corporation.

only Colorado, Nebraska and Washington prohibit paid circulators. The remainder of the states, (21) allow paid petition circulators.

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ARGUMENT

The Opinion on Rehearing En Banc of the United States Court of Appeals for the Tenth Circuit succinctly states the issue and the reasons why this statute is unconstitutional. Without restating that opinion, this Court should affirm for the following reasons:

1. Colo. Rev. Statute sec. 1-40-110 does not prevent the appellees from spending their money to generally advertise to registered voters the message to sign the petition. However, it does prevent them from hiring petition circulators to carry the message.

2. The most effective way to reach and convince someone to sign the petition is through the petition circulator.

3. The petition circulator approaches a stranger, asks him if he is a registered voter, and if the person is willing to listen, advances arguments why the initiative should be placed on the ballot. This constitutes freedom of speech regarding basic political issues.

4. The appellees testified that they had attempted to convey their message to sign the petition by individually being petition circulators. They testified that they had attempted to reach more people with their message by recruiting other volunteer petition cir-

culators. They further testified that the most cost-effective method for them to reach the greatest number of people would be through hiring petition circulators. It was impractical for them to spend their limited resources on newspaper, television or other general advertising. The prohibition against hiring petition circulators limited the number of people which each of the appellees could reach with their message. (Transcript pp. 13, 14, 32 and 36).

5. The State of Colorado has an interest in permitting only those measures which have a reasonable likelihood of passage from being placed on the ballot. The State argues that permitting only "volunteer" circulated petitions promotes this interest.

The State introduced comparison statistics gathered from other states where it is permissible to pay petition circulators. The statistics showed that a higher percentage of ballot measures were passed by the electorate when the petition signatures were gathered by "volunteer" petition circulators than where the petition signatures were gathered by paid petition circulators. However, certainly not all petitions which used paid circulators failed and not all "volunteer" measures passed. The correlation between paid vs. non-paid petition circulators and ultimate success with the electorate is far from definitive.

However, even if there is a correlation between the ultimate success of a measure and whether the signatures were gathered by paid vs. non-paid petition

circulators, there is a method to promote this governmental interest which does not infringe on the appellees freedom of speech. This interest is protected by requiring the signatures of the 46,767 registered voters before the measure is placed on the ballot. This requirement ensures that there is a reasonable likelihood of passage before the matter is placed on the ballot.

On p.6 of its Jurisdictional Statement, the State of Colorado argues that its "evidence established that paying circulators will transform a grassroots, volunteer effort into a commercialized venture, which undermines the ability of the State to determine whether there is sufficient public support to warrant the time and expense of placing the measure on the ballot."

This passage illustrates the ambiguity in the State's position. Does the State argue that it has some type of interest in preventing initiatives which are sponsored by business from being placed on the ballot? What is the additional "time and expense" to the State of Colorado from having one or more initiatives on the ballot? Is the State of Colorado more concerned with eliminating initiatives which are destined for defeat or with minimizing the number of initiatives which will be passed by the electorate? Regardless, the State of Colorado has articulated no State interest which justifies the abridgment of the appellees' right to freedom of speech on fundamental political issues.

6. The Tenth Circuit opinion is consistent with previous decisions of this Court. *Buckley v. Valleo*, 424 U.S. 1

(1976), *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

> "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate* . . .
>
> " . . . *Buckley* does not support limitations on contributions to committees formed to favor or oppose *ballot measures.*" *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley, California*, 454 U.S. 290, 296-97 (1981). (Emphasis in original.)
>
> "We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling interests thus far identified for restricting campaign finances." *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985).

7. The Tenth Circuit reached the same decision as the other federal courts which have ruled on the constitutionality of similar statutes. *Ficker v. Montgomery County Board of Elections*, No. R-85-4365 Slip Op. (D. Md. Dec. 23, 1985); *Libertarian Party of Oregon v. Paullus*, Civ. No. 82-521 F.R., Slip. Op. (D.Ore., Sept. 3, 1982); *D.C. Committee on Legalised Gambling v. Rauh*, No. 79-3296, Slip. op. (D.C. Dec. 21, 1979).

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CONCLUSION

Wherefore, the Court should affirm the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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